IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 24-____

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STATE OF WEST VIRGINIA
EX REL. STATE OF WEST VIRGINIA,
Petitioner,

v.

THE HONORABLE BRIDGET COHEE,
Judge of the Circuit Court of Berkeley County,
And LATEEF JABRALL MCGANN,
Respondents.

PETITION FOR A WRIT OF PROHIBITION

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QUESTION PRESENTED

Should this Court issue a writ to prohibit the Circuit Court of Berkeley County from enforcing orders that sentence a three-time felon to a term of less than life in prison, in direct contravention of West Virginia Code § 61-11-18(d)?

INTRODUCTION

The State of West Virginia seeks a writ of prohibition as to the circuit court's July 24, 2024, Orders sentencing Respondent Lateef McGann ("Respondent Defendant") to serve not less than two years nor more than ten years in prison, in Berkeley County Circuit Court case numbers 21-F-248 and 22-F-8.

Respondent Defendant has been properly convicted of three qualifying felonies, (Appendix Record ("App.") 39-43, 67-78), but the Respondent Judge improperly refused to impose the mandatory life sentence that West Virginia Code § 61-11-18(d) requires. The Respondent Judge acknowledged that the triggering offense and at least one predicate offense were crimes of violence under *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817 (2019). She nevertheless found that a life sentence was disproportionate. In doing so, the Respondent Judge not only failed to abide by *Hoyle*'s constraints but also failed to apply any recognized proportionality test. Instead, the Respondent Judge improperly applied an *ad hoc* arbitrary-and-capriciousness analysis to the prosecutor's discretionary choice to seek a recidivist enhancement—an approach that invades the province of the prosecutor. Finally, the Respondent Judge imposed a sentence that *no* statute recognizes, whether in the context of the underlying triggering offense or following a recidivist conviction. The State has no other remedy at law to correct this injustice.

This Court should therefore issue a writ of prohibition to prevent the lower court from enforcing its erroneous sentencing orders.

STATEMENT OF THE CASE

In October 2021, a grand jury indicted the Respondent Defendant on one felony count of fleeing from a law enforcement officer with reckless indifference ("reckless fleeing"), in violation of West Virginia Code § 61-5-17(f), one misdemeanor count of fleeing from a law enforcement officer by means other than the use of a vehicle ("fleeing on foot"), in violation of West Virginia Code § 61-5-17(d), and one misdemeanor count of driving without a valid driver's license, in violation of West Virginia Code § 17B-2-1(a). App. 17-18. After a two-day trial in February 2022, a jury found the Respondent Defendant guilty of reckless fleeing and fleeing on foot while acquitting on the count of driving without a valid driver's license. App. 19-21.

Immediately following the verdict, on February 10, 2022, the State filed a recidivist information against the Respondent Defendant. App. 22-24. It then filed an amended recidivist information on February 28, 2022, before the Respondent Defendant was arraigned on the original recidivist information. *State ex rel. Delligatti v. Cohee*, No. 22-921, 2023 WL 3676890, at *2 (W. Va. Supreme Court, May 26, 2023) (memorandum decision) ("*Cohee I*"); App. 25-27.

Substantively, both recidivist informations alleged that the Respondent Defendant had three felony convictions: the February 2022 conviction for fleeing from a law enforcement officer with reckless indifference, in violation of West Virginia Code § 61-5-17(f); two December 2009 federal convictions for possession with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), and felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and a May 2008 conviction for wanton endangerment, in violation of West Virginia Code § 61-7-12. *Cohee I*, 2023 WL 3676890, at *1; App. 25-26. The original recidivist information cited to West Virginia Code § 61-11-18(c), "which addresses the recidivist penalty for the qualifying offense of murder, rather than West Virginia Code [§] 61-11-18(d),

which correctly addresses [the Respondent Defendant's] status as a third-time offender." *Cohee I*, at *1 (footnote omitted). The amended recidivist information corrected this clerical error. *Id.*

In October 2022, the Respondent Judge granted the Respondent Defendant's motion to dismiss the recidivist information, reasoning that the State's clerical error in the original indictment effectively invalidated it. *Cohee I*, 2023 WL 3676890, at *3. After the Respondent Judge denied the State's motion to reconsider, the State petitioned for writ of prohibition with this Court. *Id.*

In May 2023, this Court found that it was "wholly immaterial" "that the original information contained a scrivener's error in the citation of a sentencing provision," and, therefore, "a harmless error analysis was appropriate." *Id.* at *6-7. In support, this Court held that it was not necessary that the sentencing statute "be included or even referenced in a recidivist information, as the directive of West Virginia Code section 61-11-19 is that *the circuit court* 'shall sentence' defendant to further confinement as prescribed by section 61-11-18." *Id.* at *5 (emphasis in original). Accordingly, "the Circuit Court of Berkeley County [wa]s prohibited from enforcing its November 22, 2022, order . . . which granted [the Respondent Defendant's] motion to dismiss the recidivist action." *Id.* at *8.

After remand, a jury found in June 2023 that the Respondent Defendant was the same person convicted of each felony alleged in the amended recidivist information. App. 39-45. The matter was then set for sentencing. Both the State and the Respondent Defendant submitted sentencing statements or sentencing memorandums for the circuit court's consideration. App. 46-53. The Respondent Judge, the Respondent Defendant, and the State were also provided with documents from the probation officer, including an Amended Pre-Sentence Investigation Report ("PSI Report") prepared in conformity with Rule 32(b) of the West Virginia Rules of Criminal Procedure. App. 79-92.

At the sentencing hearing on July 11, 2024, the Respondent Judge heard statements from both the Respondent Defendant—who spoke personally and through counsel—and the State. App. 55-59. Things then took a confusing turn.

The Respondent Judge began her discussion at sentencing by noting her oath of office and referencing both the Eighth Amendment of the United States Constitution and Article 3, Section 5 of the West Virginia Constitution, which "states that penalties shall be proportioned to the character and the degree of the offense." App. 59-60. She also cited syllabus points 5 and 6 in *State v. Horton*, 248 W. Va. 41, 886 S.E.2d 509 (2023) (quoting syl. pt. 8, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 432 (1980)), and syl. pt. 4, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). App. 60-61.

The Respondent Judge next determined that "[t]he initial emphasis that this Court is to look at is the nature of the final offense and that has been instructive to this Court," as she had "sat through that evidence" during the jury trial. App. 61. She vacillated over whether the reckless fleeing offense is a crime of violence. She initially recognized that it "is a dangerous and clearly reckless act and it shows indifference to the safety of others," constituted "a threat of violence," and "carries . . . the potential for serious injury." App. 60-61. Yet she also emphasized that the offense did not actually injure anyone, that it produced no named victim, and that the arresting officer did not submit a written sentencing statement to probation. App. 60-61. The Respondent Defendant, the Respondent Court recognized, had "a lengthy criminal history here that the Court has to consider." App. 61-62. So she determined that "there should be some enhancement of that one to five" proscribed for a felony reckless fleeing conviction. App. 61-62. But she did not appear to believe that any additional enhancement needed to conform with any particular provision of the West Virginia Code.

Having just acknowledged that the Respondent Defendant was a violent, repeat offender, the Respondent Judge nonetheless declared "that the recidivism statute as currently employed in this case appear[ed] to [her] to be arbitrary and capricious." App. 60. In support, the Respondent Judge observed that "in seven-and-a-half years on the bench this is the first recidivist action that the State has pursued," and that "[p]lea deals with much more serious criminal conduct and serious injuries to victims plead away recidivism." App. 60. Indeed, the Respondent Judge perceived that "[t]he State routinely bargains recidivism away in plea deals." App. 60. Based on this observation, the Respondent Judge found that the State was acting in an "arbitrary and capricious" manner. App. 62. At bottom, she did "not think a life sentence in this case is constitutional. I find that it would be cruel and unusual punishment." App. 60.

The Respondent Judge then sentenced the Respondent Defendant to not less than two nor more than ten years in prison for the felony offense of fleeing from a law enforcement officer with reckless indifference, and not more than one year in jail for the misdemeanor offense of fleeing from a law enforcement officer by means other than the use of a vehicle, with the two sentences to be run concurrently. App. 62-64. She did not cite any statute or otherwise explain her purported authority for imposing this atypical sentence. App. 59-62. But after pronouncing that sentence, the Respondent Judge noted the State's objection and reiterated her position: "I want clearly to state that I think the recidivism statute as currently employed is being employed arbitrar[il]y and capricious[ly]—in an arbitrary and capricious manner and that is the basis of me finding that I do have discretion." App. 62.

At the end of the hearing, the State moved to stay imposition of the sentence, and the Respondent Judge granted a thirty-day stay. App. 63, 65. For both the final offense and in the recidivism case, the Respondent Judge entered identical sentencing orders on July 24, 2024. App.

67-78. Both orders reflect a close recitation of the Respondent Judge's oral findings at hearing. App. 60-64, 67-78.

The State now seeks relief through a writ of prohibition as to the circuit court's July 24, 2024, Orders in Berkeley County Case Numbers 21-F-248 and 22-F-8.

SUMMARY OF ARGUMENT

A sentencing judge has only the power that the Legislature has chosen to give her—but the Respondent Judge imposed a sentence here that no provision of the West Virginia Code allows. Absent a finding that the triggering offense and predicate offenses were not crimes of actual or threatened violence, the Respondent Judge was required to employ the statutory penalty set forth in West Virginia Code § 61-11-18(d); anything less constitutes an illegal sentence. Because all offenses set forth in the amended recidivist information are crimes of actual or threatened violence, the Respondent Judge did not have the authority to decide that the statute was inapplicable. This case should have thus been an easy one.

Yet the Respondent Judge openly flouted Section 61-11-18(d). In going her own way, the Respondent Judge did not even examine this case under the *Cooper/Wanstreet* proportionality test. Instead, she imported a new, incorrect standard: the administrative review standard of "arbitrary and capricious." But under the right test, a life sentence for the Respondent Defendant is a proportional penalty. And the Respondent Judge clearly erred in trying to curtail the prosecutor's lawful discretion in seeking a recidivist enhancement by relying on her own anecdotal sense of how these cases typically proceed. Beyond that, the final sentence that the Respondent Judge issued has no basis in law. The Respondent Judge's orders represent a clearly erroneous action that exceeds the circuit court's legitimate powers.

Because the State has no other means to appeal, because the State will be damaged or prejudiced if this error is not correct by writ, and because this matter manifests a persistent disregard for procedural or substantive law, the Court should issue a writ of prohibition.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State does not request oral argument. The law is well settled, and a lawful sentence was not imposed. Oral argument is thus unnecessary to aid this Court in its consideration of the questions presented. W. Va. R. App. P. 18(a)(3) and (4).

ARGUMENT

Relief in prohibition is appropriate. This Court has held that "[t]he State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction." Syl. pt. 1, *State ex rel. Games-Neely v. Yoder*, 237 W. Va. 301, 787 S.E.2d 572 (2016). "Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction." *Id.* "In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial," and "the application for a writ of prohibition must be promptly presented" by the State." *Id.*

The Court set out the test for determining when prohibition should issue in the seminal case of *State ex rel. Hoover v. Berger*:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a

> discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, *Hoover*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

Here, as with the State's first writ of prohibition in this case, "[t]he State lacks the ability to pursue a direct appeal or otherwise challenge the circuit court's ruling other than by seeking extraordinary relief." *Cohee I*, 2023 WL 3676890, at *8. Thus, if relief in prohibition is not granted, the State of West Virginia "will be damaged [and] prejudiced in a way that is not correctable on appeal." Syl. pt. 4, *Hoover,* 199 W. Va. 12, 483 S.E.2d 12. The sentence also represents a manifest persistent disregard for procedural or substantive law in violation of the *Hoover* factors—after all, the Court has already issued one writ of prohibition against this circuit court, in this case, on this same recidivist information. And, if allowed to stand, this order can be repeated—not only by this Respondent Judge, but by other circuit courts as well. *Id.* So ultimately, this writ comes down to whether the lower court's order really was "clearly erroneous as a matter of law." As explained below, it was. Accordingly, relief in prohibition is appropriate.

I. The Respondent Judge erred as a matter of law in refusing to apply the statutory sentence set forth in West Virginia Code § 61-11-18(d).

"The Legislature has the power to create and define crimes and fix their punishment, and that it is the circuit court's role to impose punishment within those parameters." *State v. Riffle*, 247 W. Va. 14, 22, 875 S.E.2d 152, 160 (2022) (cleaned up). So courts "cannot set punishments that are inconsistent with the statutory penalties." *State v. Wilson*, 226 W. Va. 529, 534-35, 703 S.E.2d 301, 306-07 (2010). And if a "sentence [is] imposed" that is not "in conformity with or authorized by the statute," then it "is void and may be superseded by a new sentence in conformity with the statute." *State ex rel. Powers v. Boles*, 149 W. Va. 6, 8, 138 S.E.2d 159, 161 (1964).

Here, the West Virginia Legislature has proscribed that "[w]hen it is determined, as provided in [Section] 61-11-19 of this code, that the person has been twice previously convicted" of a felony "which has the same or substantially similar elements as a qualifying offense, the person *shall* be sentenced to imprisonment in a state correctional facility for life." W. Va. Code § 61-11-18(d) (emphasis added). Petitioner was properly convicted, under West Virginia Code § 61-11-19, of three felony offenses by a jury: reckless fleeing in 2021; possession with intent to distribute cocaine base and felon in possession of a firearm in 2009; and wanton endangerment in 2008. App. 39-45. The State followed the proper procedure and secured a valid conviction on the amended recidivist information. Yet the Respondent Judge refused to sentence the Respondent Defendant the way West Virginia Code § 61-11-18(d) demands.

The circuit court had no sentencing discretion here. Section 61-11-18(d) says "shall." And this Court has continuously held that "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. pt. 3, *Echard v. Holland*, 177 W. Va. 138, 351 S.E.2d 51 (1986) (quoting syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951)). "It is not for this Court arbitrarily to read into a statute that which it does not say." Syl. pt. 5, *State ex rel. Phalen v. Roberts*, 245 W. Va. 311, 858 S.E.2d 936 (2021). As particularly relevant to West Virginia Code § 61-11-18(d), "[i]t is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." Syl. pt. 4, *Echard v. Holland*, 177 W. Va. 138, 351 S.E.2d 51 (1986) (quoting syl. pt. 1, *Nelson v. West Va. Pub. Employees Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982)).

The Respondent Judge nevertheless insisted that a life sentence would be unconstitutional and would constitute "cruel and unusual punishment." App. 59-60. True, this Court has

recognized that "[a] criminal sentence may be so long as to violate the proportionality principle implicit in the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution." Syl. pt. 7, *Vance*, 164 W. Va. 216, 262 S.E.2d 423. While this proportionality principle can "theoretically . . . apply to any criminal sentence," it is most "applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence." Syl. pt. 4, *Wanstreet*, 166 W. Va. 523, 276 S.E.2d 205. But these principles do not greenlight circuit courts to upset statutorily mandated sentences whenever they might disagree with them.

Enforcing the proportionality principle is predominantly this Court's job, but circuit courts play a limited role, too. In *State v. Hoyle*,[1] this Court explained that a life recidivist sentence will be deemed proportionate if "two of the three felony convictions ... involved either (1) actual violence, (2) a threat of violence, or (3) substantial impact upon the victim such that harm results." Syl. pt. 12, 242 W. Va. 599, 836 S.E.2d 817. On the other hand, "[i]f this threshold is not met, a life recidivist conviction is an unconstitutionally disproportionate punishment under Article III, Section 5 of the West Virginia Constitution." *Id.* In applying the *Hoyle* test, "whether a conviction for a certain crime qualifies as a crime punishable by confinement in a penitentiary is a question of law for the court." Syl. pt. 5, *State v. Costello*, 245 W. Va. 19, 857 S.E.2d 51 (2021). And the circuit court decides whether "two of the three felony convictions" are crimes of violence. But once it so finds, proportionality has been established.

Deciding whether Petitioner's prior convictions constitute qualifying convictions is somewhat easier here, as the Legislature has provided guidance. Since 2020, the West Virginia

[1] *Hoyle* references West Virginia Code § 61-11-18(c) (Acts 2000, c. 87), which is the prior section for the current iteration of West Virginia Code § 61-11-18(d).

Code § 61-11-18(a) has set forth enumerated "qualifying offenses," which cite directly to state law. West Virginia Code § 61-11-18(d) recognizes that any conviction "which has the same or substantially similar elements as a qualifying offense" is also a qualifying offense. Each of Petitioner's convictions, as set forth in this case, meet the statutory definition for "qualifying offense."[2] His final offense, reckless fleeing, is specified in West Virginia Code § 61-11-18(a)(55), while his first predicate offense, wanton endangerment, is specified in West Virginia Code § 61-11-18(a)(62). His middle convictions—possession with intent to distribute cocaine base and felon in possession of a firearm—were obtained in federal court, but are recognized by analogous qualifying offenses in West Virginia Code §§ 61-11-18(a)(1) and (58), respectively.

If the statutorily listed qualifying offenses were not sufficient to prove that the *Hoyle* parameters have been met, then the case law would further confirm that each of Petitioner's offenses is a crime of actual or threatened violence. Precedent shows that the state reckless fleeing offense here is a qualifying offense. In 2023, this Court upheld a lifetime recidivist conviction where the final offense was reckless fleeing, finding that "[w]ithout question, this crime involved a threat of violence." *Horton*, 248 W. Va. at 48, 886 S.E.2d at 516. In support of this conclusion, the Court found that "the evidence presented at trial indicated that the [defendant] drove at a high rate of speed through several busy intersections without yielding to other vehicles and disregarding

[2] West Virginia Code § 61-11-18(a) was made effective June 5, 2020 (Acts 2020, c. 88). It was amended again, effective July 6, 2021 (Acts 2021, c. 84); yet again, effective June 9, 2022 (Acts 2022, c. 79); and, lastly, effective June 6, 2024 (Acts 2024, c. 85). Petitioner's triggering offense occurred in September 2021 (App. 84); he was convicted of the triggering offense and charged with the recidivist information in February 2022 (App. 19-21, 22-27); and was convicted on the amended recidivist information on June 5, 2024 (App. 39-45). Although the exact cites have changed over the years, the triggering offense and the predicate offenses relevant herein have all been incorporated in the "qualifying offenses" definition of West Virginia Code § 61-11-18(a) since 2020, and—for purposes of this petition—are substantively identical throughout this period of time. For clarity, this petition will employ the cites pursuant to the 2024 version.

traffic lights, placing other drivers and pedestrians at serious risk of injury." *Id.* Similarly, the criminal complaint in the underlying matter indicates that the Respondent Defendant ran five stop signs while traveling at a high rate of speed to evade police. App. 84.

Likewise, the Respondent Defendant's 2009 federal conviction is analogous to this Court's findings in *State v. Norwood*, another case where a recidivist enhancement was upheld. 242 W. Va. 149, 832 S.E.2d 75 (2019). In *Norwood*, this Court found that "the delivery and use of heroin carries with it a potential for actual violence to a person," noting "an inherent risk of violence to a person" in using the street drug. *Id.* at 158, 832 S.E.2d at 84. The Court further endorsed that one of the defendant's predicate convictions, "evading police[,] clearly carries with it the risk of violence." *Id.* In this case, the Respondent Defendant was convicted of selling cocaine—a street drug—while being a prohibited felon in the possession of a firearm. App. 25-26, 39-45.

It is not hard to see how these charges involve potential violence or the threat of violence. The same is true for the other predicate offense of wanton endangerment, which sets forth that the perpetrator "wantonly performs any act with a firearm which creates a substantial risk of death or serious bodily injury to another." W. Va. Code § 61-7-12. So the Respondent Judge should have found that Respondent Defendant's last offense warranted a life with mercy sentence.

Indeed, at one point, even the Respondent Judge recognized that these crimes were crimes of violence—and that a life sentence is therefore proportionate. At a hearing on February 21, 2024—less than five months before sentencing—the Respondent Judge correctly acknowledged not only the severity of the qualifying offenses but also the circuit court's role in applying *Hoyle* to determine proportionality. App. 28-29. Citing to *Hoyle*, the Respondent Judge held that "[b]ecause all of the felony convictions listed by the State in the recidivist Information are crimes of actual or threatened violence, the Court is satisfied that pursuit of a recidivist sentence in this

matter is *not disproportionate* to the Defendant's conduct." App. 29 (emphasis added). It then denied the Respondent Defendant's pending motion to dismiss to recidivist information. But by the time of the jury trial in June, the Respondent Judge had changed her mind; she then submitted a question to the jury to determine whether the 2009 offenses of possession with intent to distribute cocaine base or felon in possession of a firearm constitutes actual violence, the threat of violence, or substantival impact upon a victim. App. 45. The Respondent Judge's choice to submit this question of law to the jury was itself error, as West Virginia Code § 61-11-19 contemplates that the jury is to reach a verdict as to identity—"that he or she is the same"—and nothing else.

Even so, by July 11, 2024, the Respondent Judge's understanding of *Hoyle* had disintegrated entirely. App. 59-64. The Respondent Judge equivocated on whether reckless fleeing was a crime of actual or threatened violence—despite citing to *Horton*—emphasizing that there was no named victim and that the investigating officer did not submit a written sentencing recommendation to probation. App. 60-61. She made those findings even though she "was the judge at the trial" and thus knew the reckless fleeing conviction to be "a dangerous and clearly reckless act [that] shows indifference to the safety of others." App. 59-60. And she thought the lack of a victim was meaningful even though this Court shot down a similar argument in *Horton* that the defendant's fleeing was not a serious offense because of the lack of a victim. 248 W. Va. at 48, 886 S.E.2d at 516.

The circuit court was limited to determining whether the *Hoyle* test was met. The Respondent Judge abandoned this obligation entirely. *Hoyle* requires a circuit court determine the proportionality of a life recidivist sentence by considering the nature of the convictions. Once the *Hoyle* threshold is met, the sentence becomes a creature of statutory application. This Court has explicitly held that once the requirements of West Virginia Code § 61-11-19 have been met,

anything *other than* the statutory sentence is "illegal." Syl. pt. 3, *State ex rel. Cobb v. Boles*, 149 W. Va. 365, 141 S.E.2d 59 (1965); syl. pt. 5, *State ex rel. Daye v. McBride* , 222 W. Va. 17, 658 S.E.2d 547 (2007). But the Respondent Judge did not refer to either of the predicate offenses and did not make any findings as to whether they constituted crimes of actual or threatened violence. App. 59-64. She stepped away from the legal parameters she was supposed to meet and instead instituted her own perception of justice. The Respondent Judge's approach exceeds her lawful authority.

The Court has had to step in in similar circumstances before. In *State ex rel. Daye v. McBride*, the circuit court sentenced a defendant to an enhanced provision of the Uniform Controlled Substance Act, even though the State had appropriately established that the defendant should be sentenced to life in prison under the recidivist statute. 222 W. Va. at 20, 658 S.E.2d at 550. The State filed a motion for a corrected sentence, under Rule 35(a) of the West Virginia Rules of Criminal Procedure, and the circuit court granted the motion, reversing course and sentencing the defendant to life imprisonment. *Id.* This Court held that "any sentence imposed, after the successful completion of the procedures prescribed in W. Va. Code, [§] 61-1-19 (1943), which does not comport with W. Va. Code, [§] 61-11-18 (2000) is an *illegal* sentence." *Id.* 222 W. Va. at 22, 658 S.E.2d at 552 (emphasis in original).

And while the defendant argued the circuit court was barred from correcting the sentence because double jeopardy "barred imposition of an increased sentence," this Court soundly rejected the argument, finding that "the initial sentence imposed by the trial court was *illegal.*" *Daye*, 222 W. Va. at 22, 658 S.E.2d at 552 (emphasis in original). "Therefore, when properly applying the mandatory language of" both West Virginia Code §§ 61-11-18 and 19, "the trial court had a duty to correct the initial *illegal* sentence and sentence the [defendant] to a state correctional facility for

life." *Id.* (emphasis in original). The Court further referred to "the unambiguous application of the general habitual offender statute," in West Virginia Code §§ 61-11-18 and 19, and found that "[o]nce this procedure was completed, the trial court was 'without authority to impose any sentence other than prescribed in [West Virginia Code § 61-11-18].'" *Id.* at 24, 658 S.E.2d at 554 (internal citations omitted). The same is true here.

The *Daye* ruling was no surprise, however, given that this Court has mandated the application of the statutory sentence of West Virginia Code § 61-11-18 for nearly fifty years now:

> Where an accused is convicted of an offense punishable by confinement in the penitentiary and, after conviction but before sentencing, an information is filed against him setting forth one or more previous felony convictions, if the jury find or, after being duly cautioned, the accused acknowledges in open court that he is the same person named in the conviction or convictions set forth in the information, the court is without authority to impose any sentence other than as prescribed in Code, 61–11–18, as amended.

Syl. pt. 3, *Cobb*, 149 W. Va. 365, 141 S.E.2d 59. *Cobb* is far from antiquated law: it was relied upon by this Court in 2010 in *State v. Harris*, 226 W. Va. 471, 702 S.E.2d 603 (2010), in 2019 in *Norwood*, and just last year in *Horton*. *Daye* expanded upon the *Cobb* principle:

> When any person is convicted of an offense under the Uniform Controlled Substances Act (*W.Va. Code,* Chapter 60A) and is subject to confinement in the state correctional facility therefor and it is further determined, as provided in *W.Va.Code,* 61–11–19 (1943), that such person has been before convicted in the United States of a crime or crimes, including crimes under the Uniform Controlled Substances Act (*W.Va.Code,* Chapter 60A), punishable by confinement in a penitentiary, the court shall sentence the person to confinement in the state correctional facility pursuant to the provisions of *W.Va.Code,* 61–11–18 (2000), notwithstanding the second or subsequent offense provisions of *W.Va.Code,* 60A–4–408 (1971).

Syl. pt. 5, *Daye,* 222 W. Va. 17, 658 S.E.2d 547.

The Respondent Judge should have been particularly aware of her obligations under *Cobb* and *Daye* given the unique procedural history of this case. Recall that this Court already addressed the sentencing of the Respondent Defendant when it issued the first writ of prohibition in this case.

Then, this Court held that the State's cite to West Virginia Code § 61-11-18 in the information was an immaterial mistake, as "the directive of West Virginia Code [§] 61-11-19 is that *the circuit court* 'shall sentence' defendant to further confinement as prescribed by [§] 61-11-18." *Cohee I*, at *5 (emphasis in original). Citing the wrong sentencing provision in West Virginia Code § 61-11-18 was harmless *because* the sentence was statutorily mandated. *Id.* It did not matter whether the Respondent Defendant was put on "notice" of the potential sentence, because the sentence was a plain function of statutory application. In other words, this Court explicitly emphasized the sentence's mandatory nature. Accordingly, this Respondent Judge, through *Cohee I*, *was* put on notice that she was obliged to impose a statutory sentence on the Respondent Defendant. But she still chose to do otherwise.

The Respondent Judge's approach undermines the "need for consistency in our law' that [can] only be achieved by defining the parameters for imposition of a life recidivist sentence." *Horton*, 248 W. Va. at 47, 886 S.E.2d at 515. Allowing her method to take hold would create a landscape of chaos and piecemeal justice, a system comprised of thirty-one circuits with seventy-five definitions of proportional sentencing. By law, however, the individualized, beliefs of the many circuit courts of this State are secondary to the statutory framework. For that reason, this Court has often refused to allow sentencing judges to institute penalties entirely divorced from the Code. In the similar and analogous case of *State ex rel. State v. Wilson*, for instance, this Court issued a writ of prohibition after a circuit court decided that a defendant was only required to register as a sex offender for ten years, even though the statute required him to register for life. No. 23-97, 2023 WL 3972467 (W. Va. Supreme Court, June 13, 2023) (memorandum decision). On the other end of the spectrum, this Court similarly overruled a circuit court that imposed a determinate sentence of one hundred years, when the statutory penalty was life with mercy. *State*

v. Tusing, 247 W. Va. 145, 875 S.E.2d 283 (2022). In short, correcting sentences that ignore statutory mandates is one of the central functions of writs of prohibition.

Here, the State followed the requirements of West Virginia Code § 61-11-19, and the Respondent Defendant was proven to have three felony convictions that qualify under the *Hoyle* standard. Yet the Respondent Judge refused to institute the statutory sentence all the same. This is a clearly illegal sentence and clear legal error. Accordingly, a writ should be issued in this case.

II. Even if a circuit court may make proportionality considerations beyond the *Hoyle* test, the Respondent Judge did not employ any recognized proportionality analysis.

To further illustrate the impropriety of the Respondent Judge's sentence in this case, it helps to consider the reasoning behind the ruling. First, the Respondent Judge did not apply any recognized proportionality standard set forth by this Court. Second, the Respondent Judge employed an "arbitrary and capricious" standard that does not apply in criminal cases (save parole), and, as applied here, usurped the prosecuting attorney's independence. Both of these issues will be addressed in turn.

A. The Respondent Judge did not apply the two-step proportionality standard from *Cooper* and *Wanstreet*, which confirms the statutory sentence here is constitutional.

Circuit courts are authorized to address proportionality through the underlying convictions, as set forth in *Hoyle*. But when this Court considers proportionality—which it does on appeal—it employs a two-part test. The first part of the test is subjective, and "asks whether the sentence for the particular crime shocks the conscience of the court and society." *State v. Cooper*, 172 W. Va. 266, 272, 304 S.E.2d 851, 857 (1983). The second part of the test is objective, where "consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction." Syl. pt. 5, *Wanstreet*, 166 W. Va.

523, 276 S.E.2d 205. In this case, the Respondent Judge did not provide a meaningful review of this standard, managing to only barely address the subjective prong and disregarding the objective prong. So even if it were appropriate for her to have taken on the wholesale task of evaluating proportionality, she did it incorrectly.

First, the Respondent Judge did not perform an adequately subjective review, under *Cooper*. Syl. pt. 5, 172 W. Va. 266, 304 S.E.2d 851. A life sentence here does not shock the conscience, nor does it "offend[ ] fundamental notions of human dignity." Syl. pts. 4 and 5, *id.* Here, all offenses contained in the amended recidivist information are "qualifying offenses" and crimes of violence. These offenses are not, however, Petitioner's only felony convictions.

Although the Respondent Defendant was only thirty-three years old at the time of his sentencing hearing, he has spent a significant portion of his adult life in the custody of the Division of Corrections and Rehabilitation. App. 82, 85-88. In addition to his 2009 conviction in federal court for possession with intent to distribute cocaine base, the Respondent Defendant also has a 2020 felony conviction in state court for conspiracy to deliver cocaine. App. 87. Even when incarcerated, the Respondent Defendant has shown that he is unable to abide by the laws. In 2021, this Court upheld a slew of convictions for the Respondent Defendant: a felony conviction of making a facility less secure, and misdemeanor convictions for rioting, conspiracy to commit a misdemeanor, and willful disruption of government process in *State v. McGann*, No. 20-0323, 2021 WL 4936272, at *1 (W. Va. Supreme Court, Sept. 27, 2021) (memorandum decision) (*McGann I*); a felony conviction of causing injuries by an inmate and a misdemeanor conviction of willful disruption of government process in *State v. McGann*, No. 20-0327, 2021 WL 4936276, at *1 (W. Va. Supreme Court, Sept. 27, 2021) (memorandum decision) (*McGann II*); and a felony conviction of escape and a misdemeanor conviction of destruction of property in *State v. McGann*,

No. 20-0329, 2021 WL 4936282, at *1 (W. Va. Supreme Court, Sept. 27, 2021) (memorandum decision) (*McGann III*).

In *McGann I*, the Respondent Defendant assaulted another inmate, and instigated a series of events that led to a three-hour-long riot where inmates barricaded entryways and covered surveillance cameras, in which the Respondent Defendant actively participated. *McGann I*, 2021 WL 4936272, at *1-2. During this time, the inmates started multiple fires. *Id.* In *McGann II*, the Respondent Defendant "punched a correctional officer approximately thirteen times in the face and head," and when "[t]he officer fled the attack," the Respondent Defendant "followed him." *McGann II*, 2021 WL 4936276, at *1. The attack was recorded on surveillance video. *Id.* In *McGann III*, the Respondent Defendant—while "awaiting trial on charges of malicious wounding and conspiracy to deliver crack cocaine"—cut the straps of his home confinement ankle monitor and left his residence without permission. *McGann III*, 2021 WL 4936282, at *1. These offenses show that—*even when incarcerated*—the Respondent Defendant continues to engage in not only criminal activity, but also acts of actual and threatened violence.

Cumulatively, Petitioner was convicted of felony offenses in 2008 (wanton endangerment), 2009 (possession with intent to distribute cocaine base and felon in possession of a firearm), 2019 (conspiracy to deliver crack cocaine; making a facility less secure; causing injuries by an inmate; and escape), and 2022 (reckless fleeing). App. 85-88. Many of these offenses came with yearslong prison terms. App. 85-88. None of these convictions—or the consequences that followed—seemed to have served as a wakeup call to the Respondent Defendant. Instead, the Respondent Defendant has persisted in his pro-criminal activity. Even while incarcerated on the underlying reckless fleeing and the overlapping parole revocation, the Respondent Defendant has received additional disciplinary "write-ups" from the regional jail for two occasions of assaulting another

inmate (November 2023 and December 2023), and for attempting to smuggle drugs into the jail (December 2023), although these allegations have not resulted in criminal charges to date. App. 80. The Respondent Judge, however, afforded only an offhanded reference to the Respondent Defendant's "lengthy criminal history," and decided that "there should be some enhancement"– but not an enhancement proscribed by any statute in the West Virginia Code. App. 61-62.

The second prong of the traditional proportionality assessment is objective. The Respondent Judge did not weigh or consider any of the factors listed in the *Wanstreet* test. Syl. pt. 5, 166 W. Va. 523, 276 S.E.2d 205. Rather than performing "a comparison of the punishment which would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction," *id.*, the Respondent Judge drew solely upon her own "seven-and-a-half years on the bench," App. 60. This is a myopic view of the objective standard. That a single circuit court judge sitting in a short period had not seen another recidivist information does not make the punishment itself disproportionate. The Respondent Judge did not ask whether recidivist informations were filed before other judges sitting in the county, did not consider the statute's application statewide, did not undergo a review on the record of this Court's voluminous jurisprudence on the issue, and did not consider similar recidivist enhancements in other jurisdictions. The Respondent Judge took her own personal recollection and reached a conclusion about disproportionality.

This is all the more troubling because the Respondent Judge, at the sentencing hearing, cited to *Horton*, a case where this Court upheld a life recidivist upon similar facts as the one at hand. There, the defendant had a triggering offense of reckless fleeing, and his two predicate offenses were malicious assault and wanton endangerment. 248 W. Va. at 43, 886 S.E.2d 509 at 511. This Court has already considered the "nature of the offense" and the application of "other

offenses within" this state, and it determined that it would not be disproportionate to apply a life sentence upon these facts. *Id.*

The point is plain enough: Even if the Respondent Judge had authority to consider proportionality beyond the *Hoyle* test, the Respondent Judge exceeded that authority by failing to apply *Coopèr/Wanstreet*. Thus, a writ should lie in this matter to prevent this injustice.

B. The Respondent Judge improperly relied upon an administrative-review standard, which disregarded the prosecutor's discretion to decide when to seek charges and sentencing enhancements.

Rather than applying the *Cooper/Wanstreet* test to its ruling, the Respondent Judge relied on her finding that the State applied the recidivist enhancement in an "arbitrary and capricious" manner. App. 60, 62. "The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume the agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl. pt. 3, *In re Queen*, 196 W. Va. 442, 473, S.E.2d 483 (1996). Because it is a standard that applies to state agencies, its only apparent relevancy in criminal law is in the realm of parole. *See,* syl. pt. 2, *State ex rel. Wooding v. Jarrett*, 169 W. Va. 631, 289 S.E.2d 203 (1982). As such, a consideration of "arbitrary and capricious" is not a mechanism by which a circuit court judge can properly limit a prosecutor's lawful discretion.

The arbitrary and capriciousness standard does not give sufficient respect to a prosecutor's charging decision. Under West Virginia Code § 7-4-1(a), "[t]he prosecuting attorney shall attend to the criminal business of the state in the county in which he or she is elected and qualified." Further, "when the prosecuting attorney has information of the violation of any penal law committed within the county, the prosecuting attorney *shall institute and prosecute all necessary and proper proceedings* against the offender." W. Va. Code § 7-4-1(a) (emphasis added). *See,* syl. pt. 4, *State ex rel. Skinner v. Dostert,* 166 W. Va. 743, 278 S.E.2d 624 (1981). Further, "[t]he prosecuting attorney is vested with discretion in the management of criminal causes, which

discretion is committed to him or her for the public good and for vindication of the public interest. Thus, the prosecutor may decide which of several possible charges to bring against an accused." Syl. pt. 1, *State v. Satterfield*, 182 W. Va. 365, 387 S.E.2d 832 (1989). "The prosecutor's discretion in the management of criminal causes includes decisions on what charges to file, against whom in what court and the type of indictment to be sought, as well as, the order and timing of these activities." *Id.* at 367, 387 S.E.2d at 834.

Here, the Respondent Judge cited to cases where the State supposedly "pled away recidivism" to "more serious criminal conduct and serious injuries to victims," as grounds for her findings that the State acted in an "arbitrary and capricious" manner. App. 60. The Respondent Judge is free to disagree with how the State sought the recidivist enhancement in this case. That disagreement does not, however, empower the Respondent Judge to find that the prosecutor did not lawfully use their discretion.

The lone instance in which a circuit court might intrude on the prosecutor's discretion would involve selective prosecution. In considering prosecutorial discretion in the context of a recidivist enhancement, this Court has held that where "there was no showing of selective prosecution . . . the prosecuting attorney has discretion to determine the charges." *State ex rel. Chadwell v. Duncil*, 196 W. Va. 643, 648, 474 S.E.2d 573, 578 (1996). Establishing selective prosecution carries "a heavy burden of establishing that [a criminal defendant] has been selectively or distinctly treated among others similarly situated and that the selectivity is based upon some impermissible consideration such as race, religion or an attempt to prevent the exercise of constitutional rights." *In Interest of H.J.D.*, 180 W. Va. 105, 108 n.4, 375 S.E.2d 576, 579 n.4 (1988).

Nothing suggests Respondent Defendant has been selectively prosecuted. The State has not been alleged to have applied this enhancement because of the Respondent Defendant's race, religion, or to prevent a constitutional right. *Id.* Although the Respondent Defendant complained at the sentencing hearing that he "never get[s] a chance when it comes to dealing with the prosecution," not even the Respondent Defendant himself has alleged selective prosecution. App. 57. And the line between prosecutorial discretion and selective prosecution is a wide chasm, indeed. Absent evidence of the latter, the former is not only permissible, but necessary. The Respondent Judge believing that the State should have sought recidivism in *other* cases does not negate the appropriateness of seeking recidivism in *this* case.

"The prosecuting attorney has a duty to vindicate the public's constitutional right of redress for a criminal invasion of rights." Syl. pt. 6, *Satterfield*, 182 W. Va. 365, 387 S.E.2d 832. It is not the province of a circuit court to inhibit the prosecutor from performing his or her duties. After pronouncing sentence, the Respondent Judge volunteered, "I want clearly to state that I think the recidivism statute as currently . . . being employed arbitrar[il]y and capricious[ly] – in an arbitrary and capricious manner and that is the basis for me finding that I do have discretion," to sentence Respondent Defendant to an extra-statutory sentence. App. 62. Yet this statement illuminates the Respondent's Judge's true position: She did not perform a proper proportionality analysis, and she did not find that the sentence was disproportionate as applied to the Respondent Defendant. Instead, she was unhappy that the State chose to seek a recidivist enhancement against the Respondent Defendant. Because she personally disagreed with the State exercising its discretion, she decided she would not comply with the statute. In so doing, the Respondent Judge not only exceeded her own legitimate authority but also eclipsed the legitimate authority of the prosecutor. *Cf. State ex rel. State v. Gwaltney*, 249 W. Va. 706, ___, 901 S.E.2d 70, 80 (2024) (issuing writ

of prohibition against dismissal of indictment where the circuit court based its dismissal on its personal view of the evidence). This affront entitles the State to the requested writ of prohibition.

III. Neither the final offense nor the recidivism statute authorized the Respondent Judge to sentence the Respondent Defendant to serve not less than two years nor more than ten years in prison.

This Court has held that "[s]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor[,] are not subject to appellate review." Syl. pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982). Here, it is not necessary to consider what factors led the circuit court to its ruling because the sentence itself is not within the statutory limits. More to the point, the sentence is not within *any* statutory limits. A recidivist conviction for three felonies under West Virginia Code § 61-11-18(d) requires a sentence "to imprisonment in a state correctional facility for life." A recidivist conviction for two felonies under West Virginia Code § 61-11-18(b) sets forth that—when the final offense is an indeterminate sentence—"the minimum term shall be twice the term of years otherwise provided for under the sentence." The statutory penalty for the final offense in this case, reckless fleeing, is imprisonment for "not less than one nor more than five years." W. Va. Code § 61-5-17(f).

The Respondent Judge did not apply any of these statutorily prescribed penalties. Instead, she sentenced the Respondent Defendant to "an indeterminate term of not less than two nor more than ten (2-10) years in prison," on the charge of reckless fleeing.[3] This sentence does not conform to the sentence for reckless fleeing, nor does it meet the statutory provisions for any recidivist enhancement. It is a sentence without a statute. Not the Code, nor the cases, nor even the common law support sentencing the Respondent Defendant to serve not less than two nor more than ten

[3] Because the misdemeanor fleeing on foot was a determinate sentence ("not more than one year"), the Respondent Judge should also have instituted a specific term. As the misdemeanor was ordered to be served concurrent with the felony, the practical effect is likely nominal.

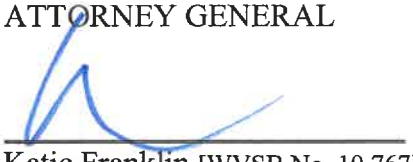
years in prison upon a three-time recidivist conviction. It does, however, demonstrate why this Court requires circuit courts to follow the statutes. A sentencing court cannot create its own law. It cannot subjectively determine what it personally believes justice to look like. Instead, a sentencing judge is charged with abiding by the laws proscribed by the legislature. Here, the Respondent Judge failed to impose a sentence commiserate with the laws of this State, and thus a writ should be issued.

CONCLUSION

Because the State cannot appeal, and because the State has met the factors set forth in syllabus point 4 of *Hoover*, 199 W. Va. 12, 483 S.E.2d 12, a writ should issue to prevent the lower court from enforcing its erroneous sentencing orders in Berkeley County Circuit Court case number 21-F-248 and 22-F-8.

Respectfully submitted,

PATRICK MORRISEY
ATTORNEY GENERAL



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Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 24-____

STATE OF WEST VIRGINA
EX REL. STATE OF WEST VIRGINA,
Petitioner,

v.

THE HONORABLE BRIDGET COHEE,
Judge of the Circuit Court of Berkeley County,
And LATEEF JABRALL MCGANN,
Respondents.

CERTIFICATE OF SERVICE

I, Katie Franklin, do hereby certify that the foregoing **Petition for Writ of Prohibition** is being served on counsel of record by File & Serve Xpress this 5th day of August, 2024.

The Honorable Judge Bridget Cohee
Berkeley County Judicial Center
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Katie Franklin
Assistant Attorney General

VERIFICATION

State of West Virginia, Kanawha County, to-wit:

I, Katie Franklin, Assistant Attorney General and counsel for the Petitioner named in the foregoing Petition for a Writ of Prohibition, being duly sworn, state that the facts and allegations contained in the Petition are true, except insofar as they are stated to be on information, and that, insofar as they are stated to be on information, I believe them to be true.

Katie Franklin

Taken, sworn to, and subscribed before me this 5th day of August, 2024.

[SEAL]

NOTARY PUBLIC OFFICIAL SEAL
LORI D. NICHOLS
State of West Virginia
My Commission Expires February 3, 2029
256 WOODLAND DRIVE NITRO, WV 25143

Lori D. Nichols
Notary Public